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IN THE

Supreme Court of the United States

October Term, 1962

No. 322

ALEXANDER T. SPERRY, *Petitioner*,

v.

STATE OF FLORIDA, ex rel., THE FLORIDA BAR,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF OF AMICUS CURIAE, ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS, IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE, ASSOCIATION OF INTERSTATE COMMERCE COMMISSION PRACTITIONERS, IN SUPPORT OF PETITIONER

The Association of Interstate Commerce Commission Practitioners, appearing as *amicus curiae* with the consent of the parties, files this brief in support of petitioner.

INTEREST OF AMICUS CURIAE

The Association of Interstate Commerce Commission Practitioners is a voluntary association whose object, as stated in its Constitution, is, in part,

> "to promote the proper administration of the Interstate Commerce Act and related acts; [and]

> to uphold the honor of practice before the Interstate Commerce Commission * * *."

Membership in the Association is open to any person who has been granted a certificate by the Interstate Commerce Commission to practice before it and to members of the regulatory bodies of the several states and the District of Columbia. Members of the Interstate Commerce Commission are honorary members of the Association. The present membership of the Association includes 3,957 persons who have been admitted to practice before the Interstate Commerce Commission.

Like the Commissioner of Patents, the Interstate Commerce Commission has express statutory authority to regulate admission to practice before it[1] and has adopted regulations for that purpose, including a code of ethics and provisions for the disciplining and disbarment of practitioners.[2] And, like the United States Patent Office and certain other federal offices and

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[1] Interstate Commerce Act, sec. 17(12), 49 U.S.C. § 17(12).

[2] General Rules of Practice, §§ 1.7-1.13, Appendix A, reissued with amendments, 27 F.R. 7520-1, 7534-7.

The Commission's original regulations governing admission to practice before it became effective September 1, 1929, at a time when the Commission's power to adopt such regulations was implied from its general power to control its own procedures and the statutory right of parties to appear before it in person or by attorney. Interstate Commerce Act, sec. 17(3), 49 U.S.C. § 17(3); *cf.* Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215, 70 L. ed. 494 (1926); Aitchison, *Practitioners before the Interstate Commerce Commission*, IV I.C.C. PRAC. J. 53 (1936). Its power was confirmed, and made express, by the Transportation Act of 1940 which added section 17(12) to the Interstate Commerce Act. 54 Stat. 916, 49 U.S.C. § 17(12). This action was taken by Congress, not, so far as appears, to remove existing doubts as to

agencies,[3] the Interstate Commerce Commission admits to practice before it, not only attorneys-at-law, but others who are found to possess the necessary qualifications.[4] As of June 30, 1961, 19,705 attorneys and 9,334 non-lawyers had been admitted to practice before the Commission.[5]

The question presented in this case—whether a state may lawfully interfere with, or prohibit, the exercise, within its boundaries, of a federally-granted authorization to practice before a federal agency—deeply concerns the entire membership of the Association, lawyers and non-lawyers alike, for the answer to that question will have an important bearing on the future administration of the Interstate Commerce Act and related acts and on the power of the Interstate Commerce Commission to control its own practice and procedure. The question, and its answer, are also of direct and immediate concern to non-lawyer practitioners before the Interstate Commerce Commission,[6] for they,

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the Commission's power, but rather in response to the Commission's request for legislation which would authorize it to impose an admission fee and provide for disposition of the proceeds. See FIFTY-SECOND ANNUAL REPORT, INTERSTATE COMMERCE COMMISSION (1938), pp. 43-4, 123; FIFTY-THIRD ANNUAL REPORT, INTERSTATE COMMERCE COMMISSION (1939), p. 50; FIFTY-FOURTH ANNUAL REPORT, INTERSTATE COMMERCE COMMISSION, (1940), p. 49.

[3] See, for example, Rules of Practice before the Tax Court of the United States, 26 C.F.R. § 701.2; Rules Governing Authority To Practice before the Internal Revenue Service, United States Treasury Deparment, 31 C.F.R. §§ 10.2 *et seq.*

[4] General Rules of Practice, § 1.8; 27 F.R. 7520.

[5] SEVENTY-FIFTH ANNUAL REPORT, INTERSTATE COMMERCE COMMISSION (1961), p. 172.

[6] The membership of the Association includes non-lawyer practitioners residing in 47 of the 50 states.

like petitioner, have, on occasion, faced challenges to the lawfulness of their practice within certain states[7] —and the diversity of opinion among the state and lower federal courts which have considered the question[8] has left a cloud upon the efficacy of their author-

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[7] De Pass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W. 2d 146 (1940); Public Service Traffic Bureau, Inc. v. Haworth Marble Co., 40 O. App. 255, 178 N.E. 703 (Ct. App. Ohio, 1931); Blair et al. v. Motor Carriers Service Bureau, Inc., et al., 40 Pa. D. & C. 413 (Phila. County, 1939); State ex rel. State Bar of Wisconsin v. Keller, 16 Wis. 2d 377, 114 N.W. 2d 796 (1962), *petition for writ of certiorari pending* (No. 429).

In the case last cited, the State contends, in its brief in opposition to the petition for a writ of certiorari, that no issue as to the petitioner's right to practice before the Interstate Commerce Commission was before the Supreme Court of Wisconsin. It is not clear, however, from a reading of the record and the Court's opinion, that the Wisconsin Court did not regard the issue as properly raised and before it for decision. In any event, the Court's comments on the point (114 N.W. 2d at p. 801) are pertinent, whether they be regarded as decision or *dictum*.

[8] In addition to the cases cited in the preceding footnote, see Crane-Johnson Co. v. Commissioner of Internal Revenue, 105 F. 2d 740 (8th Cir., 1939), *aff'd.*, 311 U.S. 54, 61 S.Ct. 114, 85 L. ed. 35 (1940); Brooks v. Mandel-Witte Co., Inc., et al., 54 F. 2d 992 (2d Cir., 1932), *cert. den.*, 286 U.S. 559, 52 S.Ct. 641, 76 L. ed. 1292 (1932); Agran v. Shapiro et al., 127 C.A. 2d 807, 273 P. 2d 619 (App. Dep., Sup'r Ct. Cal., 1954); Petition of Kearney, 63 So. 2d 630 (Sup. Ct. Fla., 1953); Noble v. Hunt, 95 Ga. App. 804, 99 S.E. 2d 345 (Ct. App. Ga., 1957); Chicago Bar Assn. et al. v. Kellogg, 338 Ill. App. 618, 88 N.E. 2d 519 (App. Ct. Ill., 1949); In re Lyon et al., 301 Mass. 30, 16 N.E. 2d 74 (1938); Auerbacher et al. v. Wood, 139 N.J. Eq. 599, 53 A. 2d 800 (Ct. Ch. N.J., 1947), *aff'd.*, 142 N.J. Eq. 484, 59 A. 2d 863 (Ct. Err. & App. N.J., 1948); Sharp v. Mida's Research Bureau, Inc., 45 N.Y.S. 2d 690 (Sup. Ct. N.Y. County, 1943), *aff'd.*, 48 N.Y.S. 2d 799 (App. Div., 1944); Battelle Memorial Institute v. Green, et al., 133 U.S.P.Q. 49 (Ct. App. Ohio, 1962).

izations to practice. The Association, therefore, has a vital interest in the decision of the question by this Court.

SUMMARY OF ARGUMENT

This case involves a direct clash between federal and state authorities. The United States Commissioner of Patents, acting under an express congressional delegation of authority, has adopted regulations governing admission to practice before the United States Patent Office. Petitioner, as a registered "patent attorney" or "agent", is authorized by the Commissioner's regulations to engage in certain activities. Simply because petitioner is not a member of the Florida Bar, the Supreme Court of Florida has enjoined him from engaging, in Florida, in activities authorized by the Commissioner's regulations.

Whether viewed from the standpoint of its effect upon the operations of the Patent Office, or from the standpoint of its effect upon petitioner, the decision below runs afoul of the Supremacy Clause. It nullifies, in part, the regulations of the Commissioner and destroys the uniformity of regulation of practice before the Patent Office, thereby obstructing the exercise of federal authority and the operations of a federal agency. It asserts a power to veto federal selection of persons to be licensed to practice before a federal agency—an activity closely related to, and affecting, the functioning of the agency itself—and to prohibit, within the boundaries of the state, the use of the license, once granted. And it denies a federally-granted right or privilege, and restrains its exercise, within the state. In short, it seeks to "take away" what federal authority "constitutionally has given".

ARGUMENT

1. This Is a Clear Case of Collision Between Federal and State Authorities

This is not one of those difficult and worrisome cases where the Court is called upon to determine whether, by occupying part of a field of regulation, Congress has, by implication, left open, or barred, the remaining portions to state occupancy;[9] or where the consistency, or repugnance, of state and federal laws or actions can be determined only by the most meticulous balancing of pertinent considerations.[10] This is a case of direct and sharp conflict between federal and state actions—

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[9] *E.g.*, Local 24 of I.B. of T., C. W. & H. etc. et al. v. Oliver et al., 358 U.S. 283, 79 S. Ct. 297, 3 L. ed. 2d 312 (1959); Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America et al. v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 S. Ct. 359, 95 L. ed. 364 (1951); International Union of United Automobile, Aircraft and Agricultural Implement Workers of America v. O'Brien et al., 339 U.S. 454, 70 S. Ct. 781, 94 L. ed. 978 (1950); International Union, U.A.W., etc., et al. v. Wisconsin Employment Relations Board et al., 336 U.S. 245, 69 S. Ct. 516, 93 L. ed. 651 (1949); Francis et al. v. Southern Pacific Company, 333 U.S. 445, 68 S. Ct. 611, 92 L. ed. 798 (1948); Rice et al. v. Santa Fe Elevator Corp. et al., 331 U.S. 218, 67 S. Ct. 1146, 91 L. ed. 1447 (1947); Bethlehem Steel Company et al. v. New York State Labor Relations Board, 330 U.S. 767, 67 S. Ct. 1026, 91 L. ed. 1234 (1947); Allen-Bradley Local etc., et al. v. Wisconsin Employment Relations Board et al., 315 U.S. 740, 62 S. Ct. 820, 86 L. ed. 1154 (1942); Cloverleaf Butter Company v. Patterson et al., 315 U.S. 148, 62 S. Ct. 491, 86 L. ed. 754 (1942); Hines et al. v. Davidowitz et al., 312 U.S. 52, 61 S. Ct. 399, 85 L. ed. 581 (1941).

[10] *E.g.*, Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 79 S. Ct. 1302, 3 L. ed. 2d 1407 (1959); Hill et al. v. State of Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. ed. 1782 (1945); Anderson v. Abbott et al., 321 U.S. 349, 64 S. Ct. 531, 88 L. ed. 793 (1944).

a case in which a federal authorization has been met, head-on, by a state prohibition.

The United States Commissioner of Patents, acting under an express congressional delegation of authority,[11] has adopted "regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office".[12] Under those regulations, petitioner is "entitled to represent applicants before the Patent Office in the preparation and prosecution of applications for patent" and "to practice before the Patent Office".[13] Nevertheless, because petitioner is not a member of the Florida Bar, the Supreme Court of Florida has enjoined him from the "preparation and prosecution of applications for letters patent * * * in this state" and from "holding himself out, in this state, as qualified to prepare and prosecute applications for letters patent * * *" (in addition to other activities).[14]

In reaching the decision that it should, and lawfully could, so enjoin petitioner, the Supreme Court of Flor-

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[11] 35 U.S.C. § 31.

[12] *Ibid.*: Rules of Practice of the United States Patent Office in Patent Cases, 37 C.F.R. §§ 1.341-1.348.

[13] 37 C.F.R. § 1.341.

[14] R. 68.

Petitioner attacks the injunction insofar as it prohibits him from engaging in specific activities covered by his authorization to practice before the Patent Office, but not as to other activities. Petition for a Writ of Certiorari, p. 9, fn. 7. The reference to specific activities in the text herein is not intended to limit the issue, but to illustrate the directness of the conflict between the injunction and petitioner's authorization under the Commissioner's regulations.

ida does not question the power of the Commissioner of Patents to adopt regulations governing admission to practice before the Patent Office,[15] nor the validity, on any other grounds, of the regulations which he has promulgated for that purpose. Neither does the Florida Court contend that the specific activities enjoined were outside the scope of petitioner's authorization, under the Commissioner's regulations; on the contrary, it appears to assume that it is dealing with "things that are necessary to be done preparatory to the actual appearance before" the Patent Office.[16] It rests its decision on the simple proposition that, under the Florida Constitution, it has exclusive jurisdiction to determine who may "practice law" in Florida,[17] and that no federal agency has the authority to grant even a limited privilege to do so.[18] And it makes but two concessions to the efficacy of petitioner's federal authorization: it suggests that the State *may* not have authority to prohibit petitioner from "appearing and practicing law" in Patent-Office proceedings held in Florida;[19] and it emphasizes that its injunction will not

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[15] R. 63-4, 65.

[16] R. 64.

[17] R. 53.

[18] R. 64, 65.

[19] R. 64.

The logic of the Court's concession on this point is not readily apparent. It would seem that the Court's premises should have produced the opposite conclusion—and the further conclusion that it had the *power* to prohibit out-of-state attorneys from "appearing and practicing law before a federal court or agency" in Florida. On the latter point, *cf.* Ginsberg et al. v. Kovrak, 392 Pa. 143, 139 A. 2d 889 (1958), *appeal dismissed*, 358 U.S. 52, 79 S. Ct. 95, 3 L. ed. 2d 46 (1958); Ex Parte McCue, 211 Cal. 57, 293 Pac. 47 (1930).

affect petitioner's right to practice before the Patent Office in Washington, D. C., or elsewhere outside the State of Florida![20]

Here, then, is an outright collision between federal and state actions. Petitioner is told, by the Supreme Court of the State, that his federally-granted authorization to practice before the United States Patent Office confers no right or privilege to engage in such practice in Florida (with the possible exception of appearances in Patent-Office proceedings held in that State); that if he wishes to engage in such practice, he must go elsewhere; and that if he persists in doing, in Florida, those things which the Commissioner of Patents has clearly authorized him to do, he will be punished for contempt.

2. In Such a Case, Federal Authority Must Prevail, Under the Supremacy Clause of the Constitution

In its long history of adjudicating disputes involving delicate problems of federal-state relations, this Court has never hesitated to give full effect to the Supremacy Clause of the Constitution,[21] once it was satisfied that state laws or actions, even though an otherwise valid exercise of reserved powers of the states, were in irreconcilable conflict with constitutionally authorized enactments or activities of the federal government. In many—perhaps most—such cases which have come before the Court, the crucial issue has been whether the asserted inconsistency was so basic, and so real in practical effect, as to foreclose accommodation and result inevitably in stalemate or

[20] R. 67, 68.

[21] Art. VI, cl. 2.

conflict[22]—and the Court has been understandably hestitant to reach such a conclusion.[23] The doctrine was stated more than 100 years ago in the much-cited case of *Sinnot et al.* v. *Davenport et al.*:[24]

> "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress or treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it. * * *
>
> "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the state law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together * * *."

But where, as here, the "repugnance or conflict" is "direct and positive", the answer is plain: the federal authority is "supreme", and the action of the state,

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[22] See, for example, cases cited footnotes 9 and 10, *supra*.

[23] See Hill et al. v. State of Florida, 325 U.S. 538, 548-56, 65 S. Ct. 1373, 1378-81, 89 L. ed. 1782, 1788-92 (1945) (dissenting opinion).

[24] 63 U.S. 227, 242-3; 16 L. ed. 243, 247 (1859).

"though * * * [taken] in the exercise of powers not controverted, must yield to it." [25]

The decisions of this Court applying the doctrine are legion, but some have a special pertinence to the situation here presented:

a. The Court has repeatedly held that a state may not interfere with or obstruct, much less prohibit, the lawful operations of the federal government, or of its officers, agencies, or instrumentalities.[26] Whether the attempted restraint by the state be direct and complete (*e.g.*, by seeking to enjoin construction of a dam authorized by Congress),[27] or indirect and partial (*e.g.*, by seeking to impose a criminal penalty on the governor of a soldiers' home for serving oleomargarine in the mess room without displaying the notice required by state law),[28] or conditional only (*e.g.*, by seeking to

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[25] See also Kelly et al. v. State of Washington, 302 U.S. 1, 9, 58 S. Ct. 87, 91, 82 L. ed. 3, 10 (1937).

[26] Public Utilities Commission of the State of California v. U.S., 355 U.S. 534, 78 S. Ct. 446, 2 L. ed. 2d 470 (1958), *reh. den.*, 356 U.S. 925, 78 S. Ct. 713, 2 L. ed. 2d 760 (1958); Franklin National Bank of Franklin Square v. People of the State of New York, 347 U.S. 373, 74 S. Ct. 550, 98 L. ed. 767 (1954); Mayo et al. v. U.S., 319 U.S. 441, 63 S. Ct. 1137, 87 L. ed. 1504 (1943); *reh. den.*, 320 U.S. 810, 64 S. Ct. 27, 88 L. ed. 489 (1943); United States v. Emory et al., 314 U.S. 423, 62 S. Ct. 317, 86 L. ed. 315 (1941); State of Oklahoma v. Guy F. Atkinson Co. et al., 313 U.S. 508, 61 S. Ct. 1050, 85 L. ed. 1487 (1941); Johnson v. Maryland, 254 U.S. 51, 41 S. Ct. 16, 65 L. ed. 126 (1920); Easton v. Iowa, 188 U.S. 220, 23 S. Ct. 288, 47 L. ed. 452 (1903); Ohio v. Thomas, 173 U.S. 276, 19 S. Ct. 453, 43 L. ed. 699 (1899); Tennessee v. Davis, 100 U.S. 257, 25 L. ed. 648 (1880).

[27] State of Oklahoma v. Guy F. Atkinson Co. et al., cited footnote 26, *supra*.

[28] Ohio v. Thomas, cited footnote 26, *supra*.

reserve to a state commission the power to determine the extent to which, and the conditions on which, common carriers may transport property for the federal government at reduced rates),[29] it has been swept aside by the Court's decisions.

Here, by enjoining petitioner from engaging, in the State of Florida, in activities which have been authorized by regulations of the Commissioner of Patents, the Supreme Court of Florida has, to that extent, nullified the regulations and denied the Commissioner's power to regulate practice before the Patent Office—a type of power regarded by this Court as "so necessary" to the proper functioning of another federal administrative agency that it was found to be included, by implication, in the agency's general power to control its own procedures.[30] And if the State can lawfully revoke, *pro tanto,* petitioner's license to practice before the United States Patent Office, it can take similar action with respect to other non-lawyers—and also, it would seem, with respect to lawyers who are not members of the Florida Bar.[31]

Moreover, by asserting, as dominant, the power of the State to determine who may engage—or at least who may *not* engage—in practice before the United States Patent Office, in Florida, the Florida Court would destroy the nation-wide uniformity of regulation obviously contemplated by Congress and the Com-

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[29] Public Utilities Commission of the State of California v. U.S., cited footnote 26, *supra.*

[30] See Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 122, 46 S. Ct. 215, 217, 70 L. ed. 494, 496 (1926).

[31] See footnote 19, *supra.*

missioner's regulations, and substitute a conglomerate system under which each state would be free to engraft local exceptions and limitations upon the federal pattern.[32] For, if Florida has the power to override the Commissioner's regulations insofar as they apply within its boundaries, so has each of the other states.

There can be no question, therefore, that the action of the Court below constitutes a direct interference with the efforts of the Commissioner of Patents to regulate practice before the United States Patent Office, and that such intereference would, in due course, obstruct the operations of the Patent Office itself, particularly if the power, asserted by the Court below, were freely exercised by the states.

b. The same rationale applies in cases where a state attempts to impose conflicting requirements upon, or to assert a veto power over, the selection by federal authorities of persons (such as contractors and licensees) to receive special authorizations to engage in activities essential, or closely related, to the functioning of the government itself or to approved governmental programs. In *Leslie Miller, Inc.* v. *State of Arkansas*,[33] this Court reversed a conviction, under a state statute, of a construction contractor for bidding on, executing, and commencing work under, a contract with the federal government without first obtaining a

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[32] The Court below does not claim the power to grant admission to practice before the Patent Office, or the concomitant power to disbar. Presumably, therefore, such matters would continue to be governed by regulations of the Commissioner of Patents, but subject to such action as might be taken by the states under the power asserted by the Court below.

[33] 352 U.S. 187, 77 S. Ct. 257, 1 L. ed. 2d 231 (1956).

state license. In a *Per Curiam* opinion, the Court said:[34]

> "Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder. In view of the federal statute and regulations, the rationale of Johnson v Maryland, 254 US 51, 57, 65 L ed 126, 129, 41 S Ct 16, is applicable * * *."

Similarly, in *First Iowa Hydro-electric Cooperative* v. *Federal Power Commission*,[35] the Court held that an applicant for a license under the Federal Power Act could not be required, as a condition precedent, to obtain a state permit, for such a requirement "would vest in the * * * [state licensing agency] a veto power over the federal project."[36] And it follows, necessarily, that a state may not lawfully interfere with, or prohibit, the activities of such a person, once they have been validly authorized by the federal government.[37]

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[34] 352 U.S. at p. 190, 77 S. Ct. at pp. 258-9, 1 L. ed. 2d at p. 233.

[35] 328 U.S. 152, 66 S. Ct. 906, 90 L. ed. 1143 (1946).

[36] 328 U.S. at p. 164, 66 S. Ct. at pp. 911-2, 90 L. ed. at p. 1150.

[37] Leslie Miller, Inc. v. State of Arkansas, cited footnote 33, *supra*. Huron Portland Cement Company v. City of Detroit et al., 362 U.S. 440, 80 S. Ct. 813, 4 L. ed. 2d 852 (1960), is not to the contrary, at least in principle. Although the dissenting Justices felt that the Court had disregarded the long-accepted doctrine that "No State law can hinder or obstruct the free use of a license granted under an act of Congress", (362 U.S. at p. 454, 80 S. Ct. at p. 821, 4 L. ed. 2d at p. 862), the majority concluded that there was no "overlap" or conflict between the applicable federal and state laws (362 U.S. at p. 446, 80 S. Ct. at p. 817, 4 L. ed. 2d at p. 858).

Here, the Commissioner of Patents has passed upon petitioner's qualifications and has registered him as a person "entitled to represent applicants before the Patent Office in the preparation and prosecution of applications for patent" and "to practice before the Patent Office". The Supreme Court of Florida has, by its injunction, vetoed the Commissioner's selection of petitioner as a person qualified to engage in those activities, *in Florida*, and has prohibited petitioner from so doing.[38] Although petitioners's practice before the Patent Office is not, concededly, the performance of a governmental function, it is closely related to the functioning of the Patent Office itself. In the same sense that attorneys are "officers" of the courts before which they practice, petitioner, as a member of the Patent Office bar, is an "officer" of that agency. And there is no question that the functioning of a court or adminstrative agency is affected by, and, in a sense, dependent upon, the quality and performance of the bar practicing before it. Hence, by asserting the power of Florida (and other states) to veto the Commissioner's selection of persons qualified to practice before the Patent Office and to revoke, in part, licenses which he may grant, the Florida Court has erected an obstacle, of potentially major proportions, to the proper functioning of a federal agency.

c. Even when there is no direct interference with the activities of the federal government, this Court has held in numerous cases that a state may not deny, or restrain the exercise of, rights or privileges validly

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[38] Except, perhaps, for appearances in Patent-Office proceedings held in Florida. See footnote 19, *supra*.

granted by federal authority.[39] The federally-guaranteed right of employees, for example, to select their own bargaining representatives[40] and to strike[41] may not be impaired by state action. Similarly, rights of action created by Congress may not be defeated or unnecessarily burdened by state procedural requirements.[42] "It is elementary that what Congress constitutionally has given, the state may not constitutionally take away."[43]

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[39] *E.g.*, Local 24 of I.B. of T., C., W. & H. etc. et al. v. Oliver et al., 358 U.S. 283, 79 S. Ct. 297, 3 L. ed. 2d 312 (1959); United Mine Workers of America et al. v. Arkansas Oak Flooring Company, 351 U.S. 62, 76 S. Ct. 559, 100 L. ed. 941 (1956); Cox et al. v. Roth, 348 U.S. 207, 75 S. Ct. 242, 99 L. ed. 260 (1955); Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America et al. v. Wisconsin Employment Relations Board, 340 U.S. 383, 71 S. Ct. 359, 95 L. ed. 364 (1951); International Union of United Automobile, Aircraft and Agricultural Implement Workers of America v. O'Brien et al., 339 U.S. 454, 70 S. Ct. 781, 94 L. ed. 978 (1950); Brown v. Western Railway of Alabama, 338 U.S. 294, 70 S. Ct. 105, 94 L. ed. 100 (1949); Hill et al. v. State of Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. ed. 1782 (1945).

[40] Hill et al. v. State of Florida, cited footnote 39, *supra*.

[41] Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America et al. v. Wisconsin Employment Relations Board, and International Union of United Automobile, Aircraft and Agricultural Implement Workers of America v. O'Brien et al., cited footnote 39, *supra*.

[42] Cox et al. v. Roth, and Brown v. Western Railway of Alabama, cited footnote 39, *supra*.

[43] See International Union, U.A.W., etc., et al. v. Wisconsin Employment Relations Board et al., 336 U.S. 245, 254, 69 S. Ct. 516, 522, 93 L. ed. 651, 663 (1949).

Even though the decision below be viewed solely from the standpoint of its effect upon petitioner—and without regard to its relationship to the Commissioner's regulations, or his control over the practice before, and procedures of, the Patent Office, or the operations of the Patent Office itself—, the answer is the same. Petitioner has a federaly-granted right or privilege to engage in practice before the United States Patent Office. The Court below has denied that right or privilege, and prohibited him from exercising it, in Florida. It has attempted to take away what federal authority has constitutionally given—and "it is elementary" that it may not constitutionally do so.

CONCLUSION

For the reasons stated, the decision below should be reversed.

Respectfully submitted,

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Dated: December 14, 1962.

CERTIFICATE OF SERVICE

I, D. W. Markham, one of the attorneys for the Association of Interstate Commerce Commission Practitioners, *amicus curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of December, 1962, I served copies of the foregoing brief on the petitioner

and respondent herein by mailing copies, in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys, as follows:

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